

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9**

Case No. 09-CB-205891

In the matter of

UNITED ASSOCIATION OF JOURNEYMEN AND
APPRENTICES OF THE PLUMBING AND PIPE
FITTING INDUSTRY OF THE UNITED STATES
AND CANADA, AFL-CIO (FFP), LOCAL 502
(Ward Engineering Co., Inc.)

and

JOE WYSSBROD, an individual

* * * * *

POST-HEARING BRIEF
FOR THE RESPONDENT

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INTRODUCTION AND SUMMARY

The General Counsel's Complaint, as amended (GC 2), alleges four specific actions by the Respondent:

- April 1, 2017, removal of Wyssbrod from the out-of-work list.
- Taking the above removal without apprising Wyssbrod of his obligations "under the union-security clause."
- Also taking the removal action without disclosing to Wyssbrod that "he could be reinstated to the job-referral list by paying a hiring hall fee" as a nonmember.
- Failing and refusing since the removal to reinstate Wyssbrod to the list or refer him to employment.

(GC Exh. 2 ¶¶ 8-9.)

The Amended Complaint further alleges that Respondent's alleged actions as set out above constitute restraint and coercion of section 7 rights. (Id. ¶ 10.)

The evidence, however, shows that the removal of Wyssbrod from the out-of-work list was based on legitimate union concerns that Wyssbrod's uncorrectable pattern of misconduct was a threat to the union's status as the exclusive provider of employees to the signatory contractors.

The evidence further demonstrated that no section 7 rights were involved in this case.

In addition, the evidence established that the General Counsel could not prove that the Respondent's referral system was an exclusive hiring hall, but rather showed that it was a non-exclusive hiring hall.

Scott Lewis was elected business manager of Local 502, and Eric Elzy was elected business agent, at the November 21, 2017 union election. (See December 19, 2017, union meeting minutes (in the record as GC Exh. 4, pp 000076-79), in particular p. 000077.)

Note on citations to the Transcript

Citations to the hearing testimony will state the page number followed by a colon, then line numbers. Example: (Tr. 150: 13-15) would designate page 150, lines 13 to 15. Where a citation refers to more than one page of continuous testimony the citation will provide the first page followed by a colon with the first line, then a hyphen followed by the last page, then colon followed by the last line. Example: (Tr. 150: 13-151: 2) would designate a passage beginning at page 150 line 13 and ending at page 151 line 2.

STATEMENT OF FACTS

A. Local 502 Non-Exclusive Hiring Hall

The testimony of every witness who addressed the point conclusively established that Local 502's hiring hall is non-exclusive, in that (a) employees are free to solicit and obtain jobs with signatory contractors without going through the hiring hall and in disregard of their place on the out-of-work list, and (b) employers are free to solicit and hire employees without use of the hiring hall. As discussed in the Argument below, Board case law establishes that this fact eliminates the duty of fair representation in connection with the hiring hall.

Lewis described in detail the alternative methods by which a worker can become employed with a signatory contractor. In actual practice, although the CBA provides at article 4, § 9 that employers agree to notify the union when employees are needed, and the union agrees to furnish employees (GD 4, p. 000043), a separate document enacted by the union membership allows both employers and employees to arrange for employment without use of the hiring hall. ("Out of work (Dispatching)" rules, GC 4, p. 000005.)

As described by Lewis, if an employer simply contacts the union and requests a certain number of employees, without naming individuals, the union would refer the employees in the order of their placement the out-of-work list.¹ (Tr. 150: 13-151: 2.) Dispatch rule 3 reflects that order of referral.

However, under the dispatch rules enacted by the membership (Tr. 153: 2-10), a member is free to contact a signatory contractor to solicit a job, as set out in rule * of the dispatch rules.

As Lewis described the practice:

4 Q. Okay. And are you aware of the
5 practice under rule eight in the local?

6 A. Yes, sir.

7 Q. What is that practice?

8 A. That practice is that each member
9 has the right to solicit their own work. They
10 can even seek employment. If they're already
11 employed by another contractor, they can seek
12 employment with other contractors and have the
13 right to quit the contractor they're currently
14 working for, go to work for another contractor
15 and no repercussions and we just ask for them
16 to tell us where they're at.

(Tr. 155: 4-16.) Lewis testified that member use of rule 8 to obtain jobs is common. (Tr. 156: 2-10.)

Rule 4 of the dispatch rules allows contractors to request members by name, instead of going through the out-of-work list order. As Lewis testified, the only requirement is that the employer confirm the request in writing. (Tr. 156: 11-21.) In addition, Rule 5 allows employers to refuse to hire specific individuals, and such refusals, if confirmed in writing, are honored by the union. (Tr. 156: 22-25.) As Lewis testified:

3 Q. To what extent is it possible for
4 a contractor to not go in order of the list?

¹ Certain contingencies such as the need for particular skills, or the need for a certain number of journeymen or apprentices, can cause minor variation in the order of referrals. (Tr. 151: 16-23.)

5 A. They have the right, if they call
6 and say I would like to know who is laid off.
7 We remove any private information, phone
8 numbers, social security numbers, and show them
9 a list of who is available for employment and
10 if they say, well, I want -- if they were to
11 want Mr. Wyssbrod or anyone else, we don't just
12 take it over the phone. We say, okay. Well,
13 we need that as an e-mail or writing that
14 you're requesting them by name, not that we
15 send you who we want.

(Tr. 151: 3-15.)

The practice, as described by Lewis, is that a member will keep his or her place on the out-of-work list for 10 working days after obtaining employment, either through the out-of-work list or through individual solicitation; after 10 days on a given job they lose their place and go to the bottom of the list. (Tr. 154: 11-16.)

Lewis's description of the hiring hall practices was confirmed in other testimony. Mike Rockwood, a long-term Local 502 member who became project manager for Ward Engineering Company, a signatory contractor (Tr. 110: 13-15), testified that when he was still working under the CBA, he directly solicited all of the jobs that he worked since completing his apprenticeship. He testified that a friend called him about an open position at a contractor, Winton Brothers, and he applied for and accepted that position without being referred by the Union. (Tr. 114-18.) He acquired his job at Ward Engineering in the "[s]ame way. A friend that was working there said a position come open if I was interested." (Tr. 114:21 - 115:1.) Rockwood did not use the Union's referral to get this job either. (Tr. 115:2 -5.) Rockwood also testified that Wyssbrod had called him several times to ask for a job, and been employed numerous times on Ward Engineering projects at Ford Motor Company. (Tr.125:-13.)

Similarly, Justin Wendler, a Local 502 member for 21 years, testified that he got most of his jobs by contacting an employer directly or by being contacted by a colleague or supervisor who was familiar with his work and wanted to hire a skilled pipefitter. Wendler testified that after serving his apprenticeship, he was employed by Scarborough Mechanical. (Tr. 135: 16-136: 5.) Wendler testified that he got the job at Scarborough by talking with somebody he had previously worked with as an apprentice (Tr. 136: 4-8), and that he was not referred through the union's referral hall. (Tr. 136: 9-12.)

After about seven years at Scarborough, Wendler secured a job at Hussung Mechanical—again through direct contact without use of the referral hall. (Tr. 137: 13-138: 3.) After a break with Hussung on some other jobs, Wendler went back to work with Hussung, again through direct contact without use of the referral hall. (Tr. 137: 14-139: 7.)

Witness also provided testimony regarding the practice of employer solicitation of individual employees in the jurisdiction of Local 502. Jim Dubey, the superintendent for Progressive Mechanical, a company located in Michigan. (Tr. 95: 7-14), testified that he hires pipefitters for jobs in Kentucky. He explained that he requests specific people to fill positions as foremen instead of taking whoever is referred by the Union, but that he also accepts referrals. (Tr. Vol. I, pp. 98:6-13.) He testified without contradiction that he has never been told by any Union official that he may not request specific pipefitters by name, or that by making such a request the CBA was violated, and that no grievance has ever been filed against his company because of these requests. (Tr. Vol. I, pp. 108:15 - 109:3.)

Mike Rockwood , project manager at Ward Engineering (Tr. 110:3-7), also testified regarding employer direct solicitation of employees. Rockwood stated that he personally contacts piepefitters who have worked for the company in the past when he is looking to fill

positions, and that he contacts the Union as a courtesy to let them know of his plan to hire particular workers. (Tr. Vol. I, p. 111:11-25.) He testified that he regularly directly solicits pipefitters to work as foremen or general foremen as well as for regular pipefitting jobs without relying on the Union's referral hall. (Id. at p. 112:5-15.) He also testified that he has refused pipefitters who had been referred by the Union because those workers were on his company's "do-not-hire" list. (Id. at pp. 112:22 - 113:1.)

Rockwood testified that pipefitters contact him directly to solicit employment "all of the time," and that there is nothing preventing them from doing so, or from being hired by Ward as a result of their direct solicitation. (Id. at p. 113:2 -8.) He testified that he has directly solicited pipefitters to work at Ward, that no official of the Union has ever told him not to do so, and that no official of the Union has ever told him that pipefitters are prohibited from soliciting their own work at Ward. (Id. at 113:5-22.)

Justin Wendler also testified regarding his knowledge of contractors soliciting individual employees without use of the hiring hall. Wendler stated that in time he became a foreman with Scarborough (Tr. 136: 16-18) and sometimes became involved in hiring decisions where he would recommend a particular pipefitter to the employer, and stated that Scarborough would hire the employee without using the referral hall. (Tr. 136: 19-137: 12.) Wendler stated that in his time with Infinity, the company has never hired anyone referred from the union hall—every pipefitter hired has been solicited directly by the company without the union's involvement. (Tr. 135: 1-3.) Currently, Wendler testified, Infinity is interested in hiring additional pipefitters, and the company has asked Wendler to identify pipefitters he knows, and to contact them directly to solicit them to hire on. (Tr. 134: 1-16.)

Asked if he was “familiar that you can solicit your own job with this Local,” Wyssbrod answered, “Absolutely.” (Tr. 58: 15-18; see also Tr. 60: 6-13.) Wyssbrod testified, “If I hear a certain contractor is going to be hiring, I call that contractor if I know them.” (Tr. 59: 8-10.)

Lewis’s testimony demonstrated that there was a roughly six year period where Wyssbrod did not obtain any work through the referral hall, but got his work in that period by soliciting it on his own. Respondent Exhibit 25 is a printout from Local 502’s digital record of his work history. (Tr. 158: 12-159: 11.) The print out shows referrals from 2007 to the present. (Id. 159: 12-21.) Asked about the gap between the 11/4/2008 referral and the next referral listed as 10/1/2014, Lewis explained that such a gap would happen if the employee “were soliciting their own work in that time period.” (Tr. 161: 14-19.)

B. The Charging Party’s Notorious, Incurable Misconduct with Employers

Wyssbrod’s history of causing problems for his employers—as well as being unpleasant with union officers and staff—is lengthy. As Lewis testified, in the construction industry an individual’s employment will generally last as long as the construction job in question takes—as little as one day, and as long as an indefinite period. (Tr. 151: 24 - 152: 13.) The evidence showed that Wyssbrod struggled to stay employed more than a week with a single employer.

Respondent Exhibit 5 is a printout of entries made by Lewis concerning Wyssbrod dating back to December 2010. Lewis testified that he began keeping these entries

in 2010 when I started having problem instantly [sic—should be constantly] with Joe and I explain to my business manager at the time, Roger Baum, he said documentation is everything. So I started keeping documentation on different events that always involved Mr. Wyssbrod.

(Tr. 175: 14-19.) Lewis testified that the entries were generally made contemporaneously with the events described, and that his intent was to be accurate in recording them. (Tr. 175: 22-176:

12.) The entries on Respondent Exhibit 5 continue through December 2016 when Wyssbrod was terminated from Ward Engineering at the Ford Kentucky truck plant.

Other documents confirm the many issues caused by Wyssbrod for employers.

Respondent Exhibit 6 is an email from BMCW, a contractor signatory with the U.A. Local in Indianapolis. (Tr. 167: 15-23.) Lewis testified that upon learning that Wyssbrod had been terminated for absenteeism and tardiness, he called to ask for substantiation, and the employer responded with the Exhibit 6 email. (Tr. 168: 4-8.) The job in question is reflected on Respondent Exhibit 25 in the 9/24/2015 to 11/9/2015 dispatch number 288 to BMWC. (Tr. 168: 20-24.) The printouts included with the email show days where Wyssbrod worked, seven hours, zero hours, and two hours—the hours of work performed by Wyssbrod on those days. (Id. 13: 19.) Lewis persuaded another Kentucky Truck Plant contractor, Stanger Industries, to put Wyssbrod to work on a different project also going on in the Kentucky truck plant. (Tr. 169: 18-170: 4.) But Wyssbrod was terminated again for “[t]he same reason, absenteeism and tardiness,” as shown by Respondent Exhibit 8. (Tr. 170:9-171: 7.)

In the very same time period, Wyssbrod was terminated by the W.J. O’Neil Company, yet another Kentucky Truck Plant contractor, because after working his first week the full 40 hours, the company “could not get him to work his standard 40-hour workweek as the job was scheduled.” (Respondent Exhibit 4, first page.) The attachments to the email are the documents which Lewis requested “to explain why they were terminating Mr. Joe Wyssbrod. (Tr. 174: 11-13.)

Pointedly, the contractor stated in Respondent Exhibit 4, “Joseph Wyssbrod will not be re-hired by W.J. O’Neil Company.”

Progressive Mechanical Superintendent Dubey testified that he terminated Wyssbrod after a week of employment, because Wyssbrod abandoned the job site without advising the night foreman who was on duty. (Tr. 99: 6-25.) That was a serious problem because it was a shutdown job at a plant where staffing is based on a schedule, and moreover Wyssbrod's exit from the plant left his working partner there by himself thus creating a safety issue. (Tr. 100: 22 – 101: 14.)

Dubey stated that he thereupon designated Wyssbrod as a "do not hire" (Tr. 101: 18-21), and that he would not hire Wyssbrod if he were referred by the union (Tr. 102: 1-4.)

Ward Engineering project manager Rockwood testified that Wyssbrod had worked for him several times. (Tr. 115: 11-12.) The last time was in December 2016, when Wyssbrod was terminated for insubordination. (Tr. 115: 13-23.) The incident is described in an October 18, 2016 letter by Rockport (Respondent Exh. 12) thus:

The reason for employment termination was insubordination. This employee was told that he was not to take a golf cart outside of the Ford Motor Company gates. This employee convinced another worker that taking a golf card outside the gates was approved. This is a direct violation of Ward Engineering's policy and a blatant disregard of directions given by his supervisor. This behavior was not atypical for Mr. Wyssbrod. This incident was an egregious violation of a direct order and cannot be tolerated.

In that letter, and a subsequent letter of December 29, 2016 (Respondent Exh. 14), Ward Engineering stated that it did not wish to employ Wyssbrod again. Rockwood explained that Ward employees are "[a]bsolutely not" permitted to take golf carts into the Ford plant parking lot (Tr. 127: 7-12), and that there is no need to take a cart into the parking to be charged up because there are charging facilities inside the plant (Tr. 125 :24 – 126: 3), and none in the parking lot (Tr. 130: 1-5.)

C. Respondent's Lengthy History of Trying to Help Wyssbrod

Lewis testified he had "[m]any times" taken steps to help Wyssbrod. (Tr. 178: 25-179: 2.) The union's difficulties in assisting Wyssbrod with his many employment issues is well illustrated by Eric Elzy's testimony regarding GC Exh. 7, a compilation of telephone message notes made by Local 502 clerical staff, and other communications and attempts to communicate with Wyssbrod.

Asked if he had communicated with Wyssbrod about job situations and later about his membership status and attempts to get back on the out-of-work list, Elzy answered, "Absolutely, yes." (Tr. 198: 17-21.) But getting hold of Wyssbrod was no easy task. Elzy testified that although Wyssbrod had the cell phone numbers of the union officers as well as the extension numbers that would put a caller directly to the office phone of any union officer (Tr. 199: 2-3), Wyssbrod persisted in leaving messages with the office staff. (Tr. 199: 3-5; id. 11-16.) And it was not unusual for Wyssbrod to behave badly in the messages he left with office staff, as illustrated by the second page of GC Exh. 7, a message of 12/30/16 for Elzy, stating, "Need a Fucking answer." (Tr. 200: 4-6.) Calling Wyssbrod back "was always very difficult." (Tr. 199: 6.) Elzy went on to state, "His phone would either be off or he wouldn't answer it." (Tr. 199: 10-11.) And, as GC 7 illustrates, Wyssbrod's telephone numbers were constantly changing. GC Exh. 7 comprises six different phone messages left with office staff by Wyssbrod. Two of them (the 4/4/16 message on the first page, and the 4/8/16 message on the fourth page) have no return phone number. Each of the other four messages each has a different return phone number (Tr. 200: 8-18), one, the 7/25/17 message on the fifth page, has two different return numbers. Each of the five numbers left was a different number.

D. The Harm to Local 502 & Its Members Caused by Wyssbrod's Misconduct

Lewis testified that through his many communications with employers of Local 502 members, he became familiar with Wyssbrod's reputation among the mechanical contractors.

(Tr. 178: 10-15.) Asked to describe Wyssbrod's reputation among the contractors, Lewis stated:

7 A. I was having a really hard time
18 getting anyone to take Mr. Wyssbrod for
19 employment. I would even say I have a welder
20 named Joseph and then they would keep asking me
21 questions. When they figured who I was talking
22 about, they would say no. It was -- they
23 would -- it was really bad and it was not for
24 lack of me trying.

(Tr. 178: 17-24.) Lewis continued:

3 Q. Did you ever hear a particular
4 name assigned to Joe Wyssbrod?
5 A. Kentucky Joe.
6 Q. Was this reputation you described,
7 was it restricted to Local 502's jurisdiction?
8 A. No.
9 Q. How far did it spread?
10 A. I know it goes all of the way up
11 to Indianapolis, Indiana.
12 Q. The headquarters of some of the
13 contractors we've just described, are they
14 restricted to the area around Kentucky?
15 A. No.
16 Q. How far do they go?
17 A. All of the way across the country.

(Tr. 179: 3-17.) As a result of the Wyssbrod-caused problems, the union was "having difficulty getting any 502 member dispatched to certain Locals because of his [Wyssbrod's] actions." (Id.: 18-24.) The Local had become known as the "the Local who had Kentucky Joe and you don't want to take a chance." (tr. 179: 25-180: 2.) Thus, Wyssbrod's reputation was having a negative

effect on the employment opportunities of other Local members, both locally and when “traveling.”²

E. The Suspension/Expulsion Process

Ultimately, the union concluded that Wyssbrod’s damage to the Local’s reputation and the consequences of that damage were too severe, and that he should not be reinstated to membership. Eric Elzy, who testified that prior business manager Danny Despain, responding to Elzy’s expression of concern about Wyssbrod,

3 always reiterated to me it doesn't matter how
4 difficult of a time it is, they are all members
5 of this local and you must treat them all the
6 same. Because I would go to Danny and speak to
7 Danny and tell him this is difficult trying to
8 get this guy to work. And he would say it
9 doesn't matter how difficult it is. You have
10 to continue to work on getting him a job
11 because he's a member of our local.

(Tr. 201: 3-11.) But ultimately even Despain concluded that Wyssbrod’s issues were too great.

(Tr. 82: 2-7; id. 201; 12-21.)

Lewis described the telephone conversation in which he told Wyssbrod that the Local did not want him back. Asked by the General Counsel if he remembered the conversation, Lewis testified:

6 Q. Okay. Do you remember him -- and
7 in that conversation he asked you what would it
8 cost to get back in the local; is that right?
9 A. Yes.
10 Q. And you told him the local didn't
11 want him then?
12 A. Yes.
13 Q. He asked you why; is that right?
14 A. Yes.
15 Q. And you said because of the past

² Business Manager Lewis described the term “traveler” as an “employee under Local 502 jurisdiction...working outside of our jurisdiction and in the jurisdiction of another Union.” (Tr. 157: 4-8.)

16 problems?
17 A. Yes.
18 Q. Okay. And Mr. Wyssbrod said the
19 only times he's had problems is when the Union
20 wouldn't do its job?
21 A. Yes.
22 Q. And in that conversation
23 Mr. Wyssbrod told you give me a price?
24 A. Yes.
25 Q. And you said there is no price?
192
1 A. Yes, ma'am.
2 Q. And you told him this was over?
3 A. I told him this conversation is
4 over.

(Tr. 191: 6-192: 4.) In fact, the Local had obtained a certified public accountant's determination of the proper cost to allocate for a nonmember to be charged for placement on the out-of-work list. That is included in the record as GC 4 pp. 000122-24. (Tr. 193: 15-18.) The union simply did not want to enable Wyssbrod to continue his damaging conduct.

Wyssbrod's testimony regarding his August 2017 conversation with Scott Lewis substantially confirms Lewis's version:

4 Q. And he said because of all of the
5 problems; is that correct?
6 A. Sounds correct.
7 Q. And you said what problems?
8 A. I can see myself saying that, yes.
9 Q. He explained to you the problems,
10 didn't he?
11 A. I can't recall. I'm sure -- I'm
12 sure there was a reference to something.
13 Q. And you responded in -- so let's
14 say profane terms to this explanation?
15 A. Probably.
16 Q. And he said then this phone call
17 is over, didn't he?
18 A. No, he said I'm done or we're
19 done.
20 Q. You said we're not done until I
21 say we're done and then you used an explicative

22 at the end of that sentence, didn't you?
23 A. I would have put it before it, but
24 that sounds correct.

(Tr. 65: 12-16.)

Local 502's actions in the process of suspension and later expulsion of Wyssbrod were consistent with the international union's Constitution. This is shown on Respondent's Exhibit 17, providing in section 157 that,

A member owing over three (3) months' dues shall automatically be suspended from membership without notice of any kind. A suspended member is denied all rights and privileges and is not entitled to any monetary benefits.

The expulsion provision are set out in Respondent Exhibit 18, at section 159 which provides that member who is six months in error with dues "shall stand expelled," and must go through a new initiation in order to regain membership in good-standing.

Wyssbrod was well aware that his failure to keep his dues up was the reason he was suspended from membership. (Tr. 39: 20 – 40: 1.) Asked about his understanding of "what it means to be suspended because of dues arrearage" Wyssbrod testified:

12 A. Yes. If you're more than three
13 months behind, the suspension is -- you have to
14 pay -- you have to come current with all months
15 that you're lacking at that time, a fifty
16 dollar fine and loss of insurance.

(Tr. 65: 12-16.)

F. Subsequent Re-Initiation Into Local 502; Continued Job Problems

As the record reflects, Wyssbrod was reinstated to the Local as of June 2014 (Tr. 193: 25-194: 8), after the Complaint was issued in this case and has since been dispatched to work. His current position on the out-of-work list at the time of the hearing was number 10. (Tr. 182: 6-11.) Wyssbrod was able to hold that position because he had been laid off from his latest employers without being able to complete 10 days of employment. (Tr. 182: 12-21.)

ARGUMENT

A. The General Counsel Failed to Prove an Exclusive Hiring Hall

The General Counsel bears the burden of proving that the Union operates an exclusive hiring hall. ***Carpenters Local 537***, 303 NLRB 419, 429 (1991). “The essence of such an arrangement is that an employer and a union agree that the union will be the sole source of referral of applicants for employment with an employer.” ***Laborers' Int'l. Union of North America***, 335 NLRB 597, 599 (2001). Where “the Employer retains the right to hire from among all applicants” the hiring hall is not exclusive. *Id.* Thus, if applicants for jobs with signatory employers can obtain employment either through the Union’s referral hall or by applying directly, then “there is no exclusive referral relationship and thus no justification for the imposition of a duty of fair representation in referrals.” ***Carpenters Local 537***, 303 NLRB at 420.

The sole evidence offered by the General Counsel regarding the exclusive/non-exclusive nature of the hiring hall was the contractual language of Article 41 of the CBA. That ignored the overwhelming evidence presented by the Union, and by Wyssbrod himself, that signatory employers are free to solicit workers directly, and that no worker is required to use the referral hall to obtain work but may directly solicit employers for jobs without breach of the CBA or any negative consequences from the Union. It is the actual practice of the parties that is determinative on this issue. In ***United Bhd. of Carpenters & Joiners of Am.***, 303 NLRB. 419, 419 (1991), the Board rejected the ALJ’s finding, based on contract verbiage, that an exclusive hiring hall existed, stating “the General Counsel has not established that the parties have an exclusive referral arrangement by practice and operation.” In ***Laborers' Int'l. Union***, *supra*, the ALJ as adopted by the Board addressed “whether the General Counsel has established the existence of such an arrangement [i.e., an exclusive hiring hall] by the practice of the parties.”

335 NLRB at 599. In that “the Employer did not rely on Respondent as the sole source of hiring referrals” the ALJ found that no exclusive hiring hall existed. (Id.)

In the present case, the General Counsel’s exclusive reliance on contract language that the uncontradicted and overwhelming evidence showed was not enforced, and disregard of the indisputable actual practice, cannot satisfy the burden of proving an exclusive hiring hall.

B. Absent Exclusivity, No Violation Can Be Found Regarding the Hiring Hall

In *Teamsters Local 460*, 300 NLRB 441 (1990), the Board ruled that a non-exclusive hiring hall eliminates the “exclusive status relating to potential employers” that gives rise to the duty of fair representation, and consequently there is no such duty regarding the hiring hall:

Where a union has a nonexclusive referral arrangement with an employer, the union has no exclusive status relating to potential employees. Individuals can obtain employment either through the union’s hiring hall or through direct application to the employer. Without the exclusive bargaining representative status, the statutory justification for the imposition of a duty of fair representation does not exist. Accordingly, no duty of fair representation attaches to a union’s operation of a nonexclusive hiring hall.

300 NLRB at 441, citing *Laborers Local 889*, 251 NLRB 1579 (1980). The Board stated that reasoning in other decisions, that a union’s monopoly of jobs and possession of discretion in referrals “tends unlawfully to encourage employees to be compliant union members,” “does not apply, in the case of a nonexclusive hiring hall because a union operating a nonexclusive hiring procedure lacks the power to put jobs out of the reach of workers.” Id.

The General Counsel failed to produce any evidence of coercion or restraint of section 7 rights or, indeed, that Wyssbrod had ever engaged in or invoked section 7 rights. In *Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 251 NLRB 1248, 1257 (1980), the Board stated: “[I]t is... only when a union operating a nonexclusive referral system ignores one of its members because he or she engaged in activities protected by Section 7 of the Act that there is

the prohibited ‘interference’ with Section 7 rights within the meaning of Section 8 (b) (1) (A) of the Act.”

The Board stated in ***United Bhd. of Carpenters & Joiners of Am.***, 303 N.L.R.B. (1991):

The complaint does not allege that McElhaney was denied membership in the Respondent because of his protected activity. Thus, the General Counsel cannot rely on the Respondent’s refusal to except McElhaney back in the Respondent as the basis for claiming that but for that refusal McElhaney would have had the protection accorded members under Section 8 (b) (1) (A) and Section 7.

Id. at 420-21. The Board therefore rejected the Administrative Law Judge’s determination against the union and dismissed the Complaint.

Here, although the Complaint alleges coercion and restraint of Section 7 rights, it does not allege, and the evidence did not suggest, any exercise of Section 7 rights that related in any way to the events in this case. There is neither a duty of fair representation violation nor a Section 7/8 (b) (1) (A) violation.

C. The Expulsion/Suspension Process Was Lawful

Local 502’s actions consistent with the provisions of the International’s constitution were lawful. See, ***Radio Electronics Officers Union v. NLRB***, 16 F.3d 1280 (D.C. Cir. 1994), where the court held that “automatic delisting” of the charging party for failure to pay dues “did not violate the statute.” 16 F.3d at 1286. In that case, ““members who failed to pay their dues by the start of the new quarter were automatically deleted from the job referral lists without advance notice.” Id. at 1285. The court found that a consistent, concrete standard negated need for notices of the obvious, stating “We find it hard to believe that a seasoned mariner who depended on the hiring hall for his livelihood was oblivious of the consequences of failing to pay his dues on time.” Id.

Identical words apply here.

D. The Union's Actions Were Based on Lawful Concerns

In *Stage Employees IATSE Local 150*, 268 NLRB 1292 (1984), the charging party had a history similar to Wyssbrod's, having "joined the union in 1971" and having been "expelled in 1981 because of nonpayment of dues." 268 NLRB at 1292. A number of signatory employers complained to the union about the charging party's work, and requested that he no longer be dispatched. Overruling the ALJ, the Board dismissed the Complaint stating, "when the interference with employment was pursuant to a valid union-security clause but also... where the facts show the union action was necessary to the effective performance of its function of representing its constituency" any presumption of interference or unlawful activity may be overcome. *Id.* at 1295. Recognizing that the union "used reasonable judgement... in concluding that further referral of Simon would jeopardize its position as the exclusive supply of the employer's employees" (*id.* at 1296), the Board held that the unions "failure to refer [the charging party] did not violate Section 8(b) (2) of the Act. The Board further held that there was no violation of Section 8(b) (1) (A) because the union "felt constrained, in light of [the charging party's] prior work difficulties... not to refer him to jobs within his jurisdiction."

Precisely so in the case at bar, Local 502 found it necessary to refuse use of its hiring hall to Mr. Wyssbrod, to protect itself and the other employees it serves from the damage to other employees' employability caused by Wyssbrod's notorious misconduct.

CONCLUSION

In that the Respondent's actions in denying use of its hiring hall to the Charging Party, and in expelling him from membership, were based on lawful concerns regarding the Charging Party's long history of damaging conduct, Respondent's action must be found lawful. We therefore request that the Complaint be dismissed.

RESPECTFULLY SUBMITTED,

s/David Leightty

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CERTIFICATE

It is hereby certified that a copy of the foregoing was served by email this 5th day of September, 2018 on the following persons:

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s/David Leightty